Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FRED W. TRIEM and DAVID A. BERG,

Petitioners,

v.

TAMICO, INC.,

Respondent,

On Petition for a Writ of Certiorari to the
Supreme Court of Alaska

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do state courts have jurisdiction that is concurrent with that of the federal courts to hear admiralty and maritime cases—such as this case of maritime salvage?

2. Does the Saving to Suitors Clause[1] of 28 U.S.C. § 1333(1) create a concurrent jurisdiction in state courts that allows them to try admiralty and maritime cases?

3. Was the historical purpose of the Saving to Suitors Clause merely to cure the abuses[2] of the pre-Revolutionary War admiralty courts?

4. Is the true meaning of the Saving to Suitors Clause found in Justice Field's explanation that it only preserves a common law remedy but *not* in a common law court?[3]

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[1] The Saving to Suitors Clause derives from Section 9 of the Judiciary Act of 1789; full text of original and modern versions is set out at pages 23-24 of the Appendix.

[2] The two abuses were denial of jury trials and denial of trial in a local vicinage.

[3] *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431, 19 L.Ed. 397, 402 (1867) (only case in which the Supreme Court has directly embraced this issue: what the Clause really means).

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IN THE

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OCTOBER TERM, 1993

FRED W. TRIEM. DAVID A. BERG. and

Petitioners,

v.

TAMICO, INC.,

Respondent.

Petition for Writ of Certiorari to the Superior Court, First Judicial District, at Petersburg, Alaska

PETITION FOR WRIT OF CERTIORARI

BEST AVAILABLE COPY

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and decision of the Superior Court for the First Judicial District at Petersburg, Alaska that was entered in this cause on 13 July 1993.

OPINIONS BELOW

The trial court's memorandum opinion of the District Court for the First Judicial District at Petersburg, Hon. Thomas E. Schulz, Presiding Judge, of 4 May 1992 has not been reported. It is reprinted in the appendix below at App. 1.

The appellate opinion of the Superior Court, Hon. Walter L. Carpeneti, for the First Judicial District at Petersburg is not reported. It appears in the appendix below at App. 7.

The Order of the Supreme Court of Alaska that denied a Petition for Hearing (discretionary review) was entered on 16 September 1993. It is not reported. It consists of only two sentences: "It is ordered: the Petition for Hearing filed on August 13, 1993 is denied. Entered at the direction of the Supreme Court on September 16, 1993." (signed) Clerk of the Appellate Courts.

JURISDICTION

The original judgment in this case was signed by Hon. Thomas E. Schulz on 2 October 1991 and filed by the Clerk of Court in Petersburg on 8 October 1991. After timely motions for reconsideration and for relief from judgment were denied, and after a timely appeal was noted and heard in the Superior Court, the Supreme Court of Alaska denied a Petition for Hearing on 16 September 1993.

Associate Justice O'Connor approved an application for an extension of time within which to file a Petition for Writ

of Certiorari in an order signed on 7 December 1993, which extended the time to file this Petition to and including 10 January 1994.

The jurisdiction of this Court to review the judgment of the state court below is invoked pursuant to 28 U.S.C. § 1257(a) ("where any . . . right, . . . is specially set up or claimed under the Constitution or the treaties or statutes . . . of the United States").

CONSTITUTIONAL PROVISION AND STATUTES

(*See Appendix*)

STATEMENT OF THE CASE

This is a case about judicial piracy. This is a classical maritime salvage case—raising a sunken object from the ocean floor—truly an *admiralty* case in every historical sense of the term. This lawsuit should have been tried in a court of admiralty, in a federal court. But it got shanghaied into a state court proceeding by Alaska's judicial policy of hearing admiralty and maritime cases in state courts rather than in federal courts.

Petitioners objected to the state court's false claim of subject matter jurisdiction. They made the argument in the trial court and they repeated it on appeal. They explained that the federal court's jurisdiction to hear admiralty and maritime cases is grounded in Article III of the Constitution; that maritime salvage cases have always been tried in courts of admiralty since time immemorial; and that the Saving to Suitors Clause does not create in the state courts a concurrent jurisdiction to hear such cases, but merely preserves a common law remedy though not in a common law court. Petitioners lost because Alaska's courts routinely ignore the Admiralty Clause.

(A) *Salvage of Sunken Airplane*: This litigation arose from the maritime salvage of a sunken airplane that had made a forced landing in the shipping channel of the Wrangell Narrows, which is Southeast Alaska's primary north-south maritime highway.

The airplane, a vintage DC-3 that was built during World War II, was on an international flight in June 1989 from Fairbanks, Alaska through Canadian airspace to California, when it stopped in Petersburg, Alaska, to refuel. As it was taking off from the Petersburg airport to continue its journey south, the DC-3's aileron cable broke and the pilot lost control. He then chose to make an emergency landing into the well-traveled waters of the Wrangell Narrows, probably to avoid a less comfortable landing in the surrounding mountains nearby. Please see Exhibits A and B, which are photographs of the salvage operation and which depict the channel and surrounding terrain. [Exhibits A and B appear in the Appendix herein.]

After the flight crew ditched the plane and were picked up by a passing fishing boat, the plane sank in the main shipping channel of the Wrangell Narrows in about 17 fathoms of salt water.

Petitioners David Berg and Fred Triem who are Petersburg's travel agent and attorney, respectively, grew up in aviation families and developed a reverence for antique aircraft. So they set out to save the DC-3, which had been named "Dixie" by her former owners in Fairbanks, where she had served for decades flying in the Interior of Alaska. Petitioners were able to locate the approximate position of the sunken aircraft by flying over the Wrangell Narrows at a low altitude and observing the sheen on the water caused by the aviation fuel escaping from the DC-3's fuel tanks. Messrs. Berg and Triem then found the exact location of the

plane by dragging the bottom with a grappling hook, aided by the use of a depth finder. A diver then affixed a buoy to the plane and petitioners temporarily retreated to their offices in Petersburg, where they incorporated Petersburg Aircraft Salvors, Inc. [PAS], the third petitioner.[4]

(B) *The Contract for Maritime Salvage*: After Petitioners' diver had attached a buoy to the sunken plane, Petersburg Aircraft Salvors, Inc. entered into a contact with Tamico, Inc. to salvage the airplane, to raise it to the surface and to tow it to shore. One of Tamico's employees made a pre-salvage estimate of $3,000.00 to salvage the plane. But just as Tamico's tow boat, barge, and crane were about to leave the dock and sail for the salvage site, Tamico presented PAS with a written contract calling for an hourly rate of $400.00 per hour to be "paid regardless of the success of the salvage operation." Contract between PAS, Inc. and Tamico, Inc. of 5 July 1989. The salvage operation continued over parts of two days, and successfully ended when the plane was deposited on Petersburg's seaplane ramp and towed up onto dry land. Several days later, Tamico sent PAS a bill for $14,600, more than twice the estimated cost of the salvage operation. PAS protested; Tamico persisted; and this lawsuit followed when Tamico sued PAS and its two incorporators, Fred Triem and Dave Berg.

(C) *State Court Litigation About the Salvage of the Airplane*: On 8 October 1991, the district court entered a judgment against the petitioners, which had been signed by Judge Schulz in Ketchikan, Alaska on 2 October 1991. [The judgment is set out in the Appendix below at App. 22]. The

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[4] Pursuant to Supreme Court Rule 29.1, Petitioners state that there are no parent companies or subsidiaries of Petersburg Aircraft Salvors, Inc. They believe the same statement can be made about Tamico, Inc., the respondent herein.

petitioners filed a timely Defendants' Motion to Reconsider on 21 October 1991, which protested that only the federal court sitting in admiralty has jurisdiction to hear a case such as this of maritime salvage. The trial court granted reconsideration and indicated that it would treat the Motion to Reconsider as a motion for relief from judgment. The petitioners also filed Defendants' Motion for Relief from Judgment on 20 December 1991, which explained in abysmal detail why the Constitution prevents the state court from trying this case: Article III confers exclusive jurisdiction upon the federal district court sitting in admiralty.

On 4 May 1992, Judge Schulz entered an oral decision on the record that decided: "In conclusion, I find the court had jurisdiction for the judgment in this case" and he denied the Motion for Relief from Judgment. App. 6. [The full text of that decision is set out in the Appendix below.]

The petitioners noted a timely appeal from the district court to the superior court. On appeal, the petitioners renewed their constitutional argument that maritime salvage cases are within the exclusive jurisdiction of the federal court sitting in admiralty. Again, the state court rejected this argument and affirmed the trial court's claim of subject matter jurisdiction. Judge Carpeneti, another superior court located in Juneau, rendered the decision on appeal on 13 July 1993.[5]

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[5] It is a quirk of Alaska Law that this "appeal" was actually no more than a review of the decision of one superior court judge (Judge Schulz, the Presiding Judge) by another superior court judge in his own district (Judge Carpeneti). In fact, the trial judge outranked the appellate judge. Under Alaska law, the defendant in a civil action filed in district court can take a direct appeal only to the superior court, not to the Supreme Court. AS 22.05.010(b); AS 22.10.020. Because Tamico filed this case in

(continued...)

After filing a timely request in the Supreme Court of Alaska to enlarge the time to seek discretionary review in that court and after more time was granted, the petitioners filed a Petition for Hearing in the Supreme Court of Alaska on 13 August 1993. Attached to that Petition were two cases that are squarely on point and set out an indefeasible argument why the state court does *not* have jurisdiction to hear a case of maritime salvage.[6]

On 16 September 1993, the Supreme Court of Alaska entered an order denying the Petition for Hearing. With that, the losing defendants exhausted all of their appellate remedies under state law. The Alaska courts are adamant: they can hear admiralty and maritime cases—or so they believe.

Although this Petition for Certiorari was due in mid-December, Justice O'Connor kindly extended the time for filing it until 10 January 1994.

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[5] (...continued)
district court, the defendants had no right of appeal to the Supreme Court. *Id.* Although not enshrined in the Constitution, there is a right of appeal that has two elements: (a) appeal to a *higher* court, and (b) review by a *multi*-judge panel. Harlon Leigh Dalton, "Taking the Right to Appeal (More or Less) Seriously," 95 Yale L.J. 62, 66 (1985).

[6] These two cases are *O'Neill v. Schoenbrod*, 355 So.2d 440 (Fla.App. 1978) *appeal dismissed*, 359 So.2d 1218 (Fla. 1978) (only federal courts sitting in admiralty have jurisdiction to hear salvage cases; it matters not that the plaintiff brought his action *in personam* instead of *in rem*); *Mark v. South Continental Insurance Agency, Inc.*, 1978 A.M. 519 (D.P.R. 1976) (federal court sitting in admiralty has jurisdiction to hear maritime salvage case involving salvage of sunken land-based aircraft from navigable waters). The *Mark* case is discussed in an exciting law review article about the maritime salvage of sunken aircraft. Comment, "Extending Admiralty Jurisdiction over Non maritime Property: Ascertaining the Salvor's Possessory and Proprietary Rights to Sunken Aircraft," 15 Pacific Law J., 977, at 986-990, 993-994 (1984).

(D) *A Paradigm for Admiralty Jurisdiction*: The author of a textbook would have to search long to find a better example of a classical admiralty case than the instant case. There are at least five reasons why this case is a paradigm for the exclusive jurisdiction of the federal court sitting in admiralty:

(1) *Maritime Location*: The sunken airplane landed in ocean water, the navigable waters of the United States, smack in the middle of a major shipping lane.

(2) *Maritime Subject Matter*: The raising of a sunken object is a classical form of maritime salvage and has always been a subject within the exclusive jurisdiction of courts of admiralty.[7]

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[7] Admiralty law does not require that maritime salvage necessarily involve either a vessel or its cargo. The term "salvage" is much broader in its reach. For example, see *Colby v. Todd Packing Co.*, 77 F.Supp. 956, 12 Alaska 1, 1948 A.M.C. 1881 (D.Alaska 1948) (salvage claim for recovery of floating fish traps); *A Raft of Spars*, 20 Fed.Cas. 173 (No. 11,529) (S.D.N.Y. 1849) (lumber); *50,000 Feet of Timber*, 9 Fed.Cas. 47 (D.C. Mass. 1871) (No. 4,783) (timber).

Other examples that illustrate the wide range of objects that can become the subject of a maritime salvage action are demonstrated in the following cases: *Hollingsworth v. Seventy Doubloons & Three Small Pieces of Gold*, Fed.Cas. No. 6,620 (D.C.Pa. 1820) (box floating in the ocean and containing specie); *Garder v. Ninety-Nine Gold Coins*, 111 F. 552 (D.C.Mass 1899) (also specie); *Broere v. Two Thousand One Hundred Thirty-Three Dollars*, 72 F.Supp 115 (E.D.N.Y. 1947) (money found on a dead body found floating in the water). An extreme example is presented by an early American admiralty case, *Bass v. Five Negro Slaves and A Canoe*, Fed.Cas. No. 1,093 (D.S.C. 1803), where salvage was awarded for the recovery (i.e., capture) of escaping slaves, who had been found adrift in the Gulf stream.

The admiralty will recognize a claim for salvage, regardless of whether the object saved is floating on the water or has sunk below the water. *Ghen v. Rich*, 8 F.159 (D.Mass. 1881) (libel for value of fin-back whale, killed by exploding harpoon, sunk, and

(continued...)

(3) *Maritime Contract*: This case involves a maritime contract to perform salvage. The contract was made and performed on the water.

(4) *Traditional Maritime Nexus*: Admiralty law includes a wide range of topics within its ambit, such as towage, wharfage, moorage, passage, salvage, collision, and general average, as well as maritime contracts and maritime torts.[8]

(5) *International Maritime Treaty*: State court judges and non-admiralty attorneys are unaware that the United States is a signatory to a host of international maritime treaties on the subject of salvage. In addition to many binary salvage treaties such as one with Canada, the United States is a party to The Salvage Convention of 1910, Brussels, 23 September 1910, U.S.T.S. No. 576, 37 Stat. 1658, 1670 (1913). Our substantive law of salvage derives from this Treaty. The Salvage Act of 1912, 37 Stat. 242 (1912), codified at 46 U.S.C. §§727-731. The salvage of this airplane was directly controlled by the Treaty of Salvage and Wrecking—Canada, 18 May 1908, U.S.T.S. No. 502, 35 Stat. 2035 (1908), which covers an international flight from

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[7] (...continued)
later washed ashore); *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F.Supp 452, 1960 A.M.C. 1774 (E.D.Va. 1960) (marble retrieved from sunken vessel); *Cobb Coin v. Unidentified, Wrecked, & Abandoned Sailing Vessel*, 525 F.Supp. 186 (S.D. Fla. 1981) (sunken Spanish treasure ship); *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982) (the *Nuestra Senora de Atocha*, a Spanish galleon with her sunken treasures).

[8] "In fact, the traditional statement is that the federal court has *exclusive* jurisdiction of an action seeking a salvage award." D. Owen, "Some Legal Troubles with Treasure; Jurisdiction and Salvage," 15 J.Mar.L. & Com. 139, at 148 (1985) (emphasis in the *original*).

Canada to the U.S. where the salvage occurs "within a distance of thirty miles from the International Boundary" on the Pacific Coast. *Id.*

REASONS FOR ALLOWANCE OF WRIT

This is a small case with a big issue of constitutional law: Do state courts have a concurrent jurisdiction to hear maritime and admiralty cases, such as this case of maritime salvage? Squarely presented here is the oldest open, still-unanswered question in American Constitutional jurisprudence: Does the Saving to Suitors Clause of The Judiciary Act of 1789 create in the state courts a concurrent jurisdiction to hear admiralty and maritime cases? And if it does, then is the Saving to Suitors Clause unconstitutional, being repugnant to The Admiralty Clause, Article III, Section 2, Clause 1 of our Constitution, which confers exclusive jurisdiction to hear such cases upon the federal courts sitting in admiralty?

The courts of a few states, notably those of Alaska, New York, and Connecticut are interpreting the Saving to Suitors Clause to mean that all admiralty cases can be tried in state courts. But the historical evidence from the time of the Revolution shows that the Saving to Suitors Clause was not intended to diminish or subvert the exclusive nature of the federal court's admiralty power. Instead, the Saving to Suitors Clause was intended only to cure two evils of the pre-Revolutionary War era. First, the Crown's use of the admiralty courts to defeat the right to trial by jury in certain revenue and customs offenses. Second, the admiralty court's practice of conducting these trials outside the local vicinage where the offense was alleged to have been committed or where the defendant resided. The true purpose of the Saving to Suitors Clause was to preserve a

common law remedy (jury trial in local vicinage) but *not* in a common law (state) court.

Despite Article III's command of exclusive jurisdiction, there are powerful contrarian economic incentives in state courts to ignore the Constitution and to stretch the meaning of the Saving to Suitors Clause beyond what its Framers intended. The Clause is not unconstitutional, except as it is being applied in some state courts. These monetary incentives frequently surface in the state courts of Alaska, which offer more generous awards of attorney's fees and prejudgment interest than might be had in courts of admiralty.

There are two reasons why a writ of certiorari should issue: (1) There is a conflict between state courts, Supreme Court Rule 10.1(a), and (2) This is an important question of federal law that needs to be settled, Supreme Court Rule 10.1(c).

I. EXORDIUM: THE ADMIRALTY JURISDICTION IS EXCLUSIVE

The word "exclusive" does not appear in the Admiralty Clause. But it *means* exclusive. When placed in a chronological sequence, there are twelve categories of information and legal authority to support the proposition—universally accepted—that the jurisdiction of the federal courts to hear admiralty and maritime cases is *exclusive*.

(1) *English Admiralty Jurisdiction Was Exclusive*: Some legal scholars contend that our American admiralty jurisdiction was simply intended to embrace and adopt the jurisdiction of the English court of admiralty as it existed at the time of the Revolution. A modest collection of cases defining the English jurisdiction will be found in the de-

fendants' memorandum of 19 December 1991 at page 41. [Aside: Justice Story did not accept this narrow view of American admiralty jurisdiction. He contended that our jurisdiction was much broader in scope. The classical exposition is found in *DeLovio v. Boit,* 7 F. Cas. 418 (C.C.D.Mass. 1815) (No. 3,776), *approved in Insurance Company v. Dunham*, 78 U.S. (11 Wall.) 1, 20 L.Ed. 90 (1871).]

(2) *The Vice Admiralty Courts in the Colonies Had Exclusive Jurisdiction*: The historical evidence shows that the purpose of the Saving to Suitors clause was to preserve the common law rights of jury trial and trial in a local vicinage. These rights had been abrogated by the colonial vice admiralty courts, which had exclusive admiralty jurisdiction and which were used by the Crown to deny the colonists a jury trial in their own vicinage.

> An issue subsidiary to taxation, but also of constitutional status, was the colonists' insistence on a right to jury trial. Violations of the Sugar Act and the Stamp Act were subject to prosecution in the Vice-Admiralty courts, where trial was before a judge alone; furthermore, a Vice-Admiralty court in Halifax, Nova Scotia, was given jurisdiction over offenses in all the American colonies, so that trials could be held entirely free from the check of local opinion. According to the entirely mythical version of history that Coke and other founders of English Whiggery constructed, and to which colonial spokesmen firmly adhered, Englishmen had from immemorial antiquity enjoyed the right to be punished only upon the verdict of a jury of their peers. Smuggling offenses in England had long been subject to trial by jury in the common law courts. Accordingly, colonial spokesmen considered the admiralty jurisdiction an unconstitutional violation of the Englishman's right to jury trial. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan.L.Rev. 843, 870 (1978). (footnotes omitted).

A more complete discussion of the role of the vice admiralty courts in the Colonies can be found in the defendants' reply brief of 10 February 1992 at pages 4-24. The attention of the Court is invited to this former pleading, in which the appellants—here, petitioners—have explained the true purpose of the Saving Clause.

(3) *The Federal Court had Exclusive Jurisdiction During the Revolution*: Under the Articles of Confederation, there was a federal Court of Appeals that was created to hear admiralty cases during the American Revolution. Some of the decisions of this court are reported in 1 Dallas (reprinted in Vol. 1, L.Ed.). The Court of Appeals continued the practices established before the Revolution and it inherited the exclusive jurisdiction of the pre-war admiralty cases. The fact that a war intervened, to be followed by a new system of government in the Colonies, did not change the exclusive nature of the federal admiralty jurisdiction.

> [T]he change in the form of our government has not abrogated all the laws, customs, and principles of jurisdiction we inherited from our ancestors, and possessed at the period of our becoming an independent nation. *The Catherina*, 23 F.Cas. 1028, 1030 (D.Pa. 1795) (No. 13,949).

The old practices continued; the exclusive jurisdiction of the admiralty continued during and after the Revolutionary War.

(4) *Correspondence Before the Constitutional Convention*: In the four years preceding the Constitutional Convention of 1787, the nation's leaders corresponded with each other and proposed changes to the Articles of Confederation.

> [The contemporaneous writings of the Framers of the Constitution included the following comments showing their intent to award jurisdiction of admiralty exclusively to the federal judiciary:]

> Charles Pinckney's plan dating as early as 7 August 1786 (Congress to have the exclusive right of instituting in each State a Court of Admiralty); George Mason wrote to Arthur Lee ("The most prevalent idea,. . . is . . . to establish . . . a judiciary system with a cognizance of all such matters as depend upon the law of nations . . ."); Madison wrote to Randolph on 8 April 1787 ("The admiralty jurisdiction may be fully submitted to the National Government.") and to Washington on 16 April 1787 ("The admiralty jurisdiction seems to fall entirely within the purview of the National Government"). Charles Warren, Congress, The Constitution, and The Supreme Court, pg. 30, ftn. 1 (2nd ed. 1935) (footnote to text quoted above from pgs. 29-30).

Even before the Convention convened in Philadelphia, there was a consensus that the admiralty jurisdiction should be within the sole province of the new federal government.

(5) *The Constitutional Plans*: When the delegates arrived in Philadelphia in late spring of 1787, some of them had already drafted proposals and plans for a new constitution. There was a unanimous view that the admiralty jurisdiction should remain exclusively with the federal government.

> Eighth, the jurisdiction given to the Judiciary over national matters . . . The remaining portions of jurisdiction granted to the Federal Judiciary were simply an extension of similar jurisdiction possessed by Courts under the Articles of Confederation as to such national matters as admiralty cases. Many of the subjects over which jurisdiction was granted by the Constitution had been suggested in pamphlets and letters for four years prior to the Convention. Charles Warren, Congress, The Constitution, and The Supreme Court, pg. 29-30 (2nd ed. 1935) [footnote omitted].

These plans were circulated at the Convention and incorporated into the new Constitution.

(6) *The Constitutional Convention—Debate and Lack of It*: The records of the Constitutional Convention are almost silent on the subject of the admiralty jurisdiction. This is so because there was no debate of the topic—everyone having agreed that the new federal government should establish courts, which in turn would have exclusive jurisdiction over such matters.

> [T]he admiralty jurisdiction ought to be given wholly to the national government, as it relates to cases not within the jurisdiction of particular states, and to a scene in which controversies with foreigners would be most likely to happen. 1 Farrand, *Records of the Federal Convention*, 124 (1911).

The silence of the record simply reflects the common consensus of the time. There was no disagreement on this topic.

(7) *Ratification Debate*: After the Convention recessed in September 1787, the disciples of the new Constitution returned to their homes, where each state conducted its own constitutional convention. The debate in some of these conventions has been recorded and handed on to us. The debate in Virginia is especially enlightening for what it shows about the intent of the framers to preserve the exclusive jurisdiction of the federal judiciary in maritime matters.

> If, in any case, uniformity be necessary, it must be in the exposition of treaties. The establishment of one revisionary superintending power can also secure uniformity. . . . To the same principles may also be referred their cognizance in admiralty and maritime cases. As our intercourse with foreign nations will be affected by decisions of this kind, they ought to be uniform. This can be done only by giving the federal judiciary exclusive jurisdiction. Controversies affecting the interests of the United States ought to be determined by their own judiciary, and not be left to partial, local tribunals. 3 *Elliott's, Debates* 532 (2d ed. 1900).

> 'Cases of admiralty and maritime jurisdiction cannot, with propriety, be vested in particular state courts. As our national tranquillity and reputation and intercourse with foreign nations may be affected by admiralty decisions; as they ought, therefore, to be uniform; and as there can be no uniformity if there be thirteen distinct, independent jurisdictions,—this jurisdiction ought to be in the federal judiciary.' 3 *Elliott's Debates* 571 (2d ed. 1900).
>
> Cases of admiralty and maritime jurisdiction cannot, with propriety, be vested in particular state courts. As our national tranquillity and reputation, and intercourse with foreign powers, may be affected by admiralty decisions; as they ought, therefore, to be uniform; and as there can be no uniformity if there be thirteen distinct, independent jurisdictions,—this jurisdiction ought to be in the federal judiciary. On these principles, I conceive the subjects themselves are proper for the federal judiciary. Governor Randolph at the Virginia Constitutional Convention. 3 *Elliott's Debates* 571 (1788).

There are no reports of any dissenting views on this point. It seems that no one dissented from the exclusivity proposal.

(8) *The Federalist Papers*: The most publicized ratification debate took place in the popular press of New York. Alexander Hamilton, a proponent of a strong federal government, wrote often on the subject of the new Constitution. Here are his views on the admiralty jurisdiction:

> To judge with accuracy of the due extent of the federal judicature, it will be necessary to consider, in the first place, what are its proper objects.
>
> . . . .
>
> The fifth point will demand little animadversion. The most bigoted idolizers of state authority, have not thus far shown a disposition to deny the national judiciary

> the cognizance of maritime causes. These so generally depend on laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present confederation, submitted to federal jurisdiction. Hamilton, *The Federalist*, No. LXXX (1788).

Although Hamilton had many detractors, none chose to contradict his opinion on this point.

(9) *The Enabling Legislation*: When the First Congress met in New York in the spring of 1789, Senate Bill No. 1 was the legislation that became the First Judiciary Act. A careful reading of Sec. 9 shows that the First Congress carefully distinguished between those types of cases for which the federal and state courts had a *concurrent* jurisdiction from those cases in which the federal jurisdiction was *exclusive*:

Sec. 9. ***And be it further enacted***, That the district courts shall have, *exclusively* of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have *exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have *ex-*

clusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. And shall also have cognizance, *concurrent* with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. And shall also have cognizance, *concurrent* as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction *exclusively* of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

The Judiciary Act of 1789, 1 Stat. 73 , 76-77 (underlining supplied to illustrate the careful distinction that was made between concurrent and exclusive jurisdictional grants, and to show that the Saving to Suitors Clause is squarely in the middle of a long sentence of exclusive grant).

A careful reading of this section, in which the underlining shows which causes were exclusive and which were concurrent, reveals that the admiralty jurisdiction is listed as "exclusive." If Congress had intended that there be a concurrent jurisdiction with the state courts, then it surely would have said so, as it did say for other types of cases also mentioned in the same section. This point is explained in more detail by Frederick Bausman, *Admiralty and Maritime Jurisdiction*, 36 Amer.L.Rev. 182, 187-88 (1902) ("[t]hat the framers of the Constitution intended the admiralty jurisdiction to be exclusive is clear, despite the silence of the instrument").

(10) *The Early Federal Cases*: The early decisions of the new federal courts reflect the common knowledge and understanding of the times: that federal courts and only federal courts can hear admiralty cases. See, e.g., *Brevoor v. The Fair American*, 1 Pet. Adm. Rep. 87, 4 F. Cas. 73 (D.Pa. 1800) (No. 1,847) ("as to the jurisdiction of this court, in cases of salvage on the sea, . . . nor do I see how a common law court could legally take cognizance of such a case").

(11) *The Early Decisions of the Supreme Court*: In the earliest years of the new Republic, the admiralty jurisdiction was a topic that came before the new Supreme Court. It was always sustained.

> The judges being decidedly of opinion, that every district court in the United States possesses all the powers of a court of admiralty, whether considered as an instance, or as a prize court, and that the plea of the aforesaid appellee, Pierre Arcade Johannene, to the jurisdiction of the District Court of Maryland, is insufficient.
>
> . . . no foreign power can of right institute, or erect, any court of judicature of any kind within the jurisdiction of the United States . . ., it is therefore decreed and adjudged that the admiralty jurisdiction, which has been exercised in the United States by the consuls of France, not being so warranted, is not of right. *Glass v. The Sloop Betsy*, 3 Dallas 6, 1 L.Ed. 485 (1794) (Jay, C.J.) (the jurisdictional challenge was overruled, and the district court's decision to dismiss the complaint for want of subject matter jurisdiction was reversed).

The opinions of the Supreme Court in its early years, especially those of Chief Justice Marshall and Chief Justice Taney, reflect the Court's understanding of the Constitutional grant. These early cases are collected and discussed in the defendants' memorandum of 19 December 1991 at pages 26-28.

(12) *Early Decisions of the State Courts*: During the first century of our new Republic, the state courts also were called upon to make decisions in admiralty and maritime cases. They consistently and uniformly refused to do so. The early case law to illustrate this point is collected in the defendants' memorandum of 19 December 1991 at pages 33-36. Before the Civil War, the state courts recognized that they had no jurisdiction to hear admiralty cases. But as the Framers of the Constitution died off and the memories of the abuses of the colonial vice admiralty courts faded, the states' rights advocates took over. And after the Civil War, there began to appear isolated examples of attempts by state courts to usurp the federal admiralty power. Whenever these cases were appealed to the U.S. Supreme Court, they were reversed—the Supreme Court holding that only federal courts could decide maritime and admiralty disputes. *See, e.g. The Moses Taylor*, 71 U.S. 411 (1867) (Justice Field explained that the Saving to Suitors Clause preserved a common law remedy but not in a common law court); *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555, 18 L.Ed. 451 (1867) (Congress did not intend to give suitors state law remedies).

II. ALASKA'S JUDICIAL POLICY OF HEARING ADMIRALTY CASES IN THE STATE COURTS VIOLATES THE ADMIRALTY CLAUSE OF THE CONSTITUTION

The first reason for granting certiorari is the conflict that exists between the decisions of the Supreme Court of Alaska and decisions about the same issue that have been made by the highest courts of other states. The recent decisions from Alaska—and some older cases from New York—show that these state courts are marching to a different drummer; they are not in step with the Constitution.

(A) *Alaska has its Own Admiralty Jurisprudence*: In Territorial days, the only courts in Alaska were the federal courts. Thus, every case was a federal case and admiralty cases had to be filed in the proper court—there was no choice. But soon after Alaska achieved statehood 35 years ago, its new state courts began to hear admiralty cases under the purported authority of the Saving to Suitors Clause, Section 9, Judiciary Act of 1789, now codified at 28 U.S.C. §1333(1). See, e.g., *Maxwell v. Olsen*, 468 P.2d 48 (Alaska 1970) (Saving to Suitors Clause "means that a suitor asserting an *in personam* admiralty claim may elect to sue in a 'common law' state court through an ordinary civil action") (Rabinowitz, J.). Under the leadership of Alaska's most senior jurist, our state supreme court has run rough-shod over the Admiralty Clause, usually relying upon the Saving to Suitors Clause. *Shannon v. City of Anchorage*, 478 P.2d 815 (Alaska 1970) (Saving to Suitors Clause allows plaintiff to elect to sue in a common law or state court) (Rabinowitz, J.). When deciding cases involving maritime torts, the Alaska Supreme Court has paid some obeisance to federal law. *Barber v. New England Fish Co.*, 510 P.2d 806 (Alaska 1973) (when admiralty cases are tried in state court, Alaskan courts must apply same substantive law as the federal court when dealing with federal maritime tort). Alaska courts have not always limited their state-court "admiralty jurisdiction" to claims brought *in personam*; Alaska's admiralty jurisdiction has been applied even to cases brought *in rem*. *F/V America Eagle v. State*, 620 P.2d 657, 671 (Alaska 1980) (Rabinowitz, C.J.).

Some areas of maritime law for so long have been held to be within admiralty's exclusive jurisdiction that few state courts would attempt to hear such cases. For instance, maritime salvage cases. But even these disputes have been

brought within the expansive sweep of Alaska's "admiralty jurisdiction." *Williams v. Eckert*, 643 P.2d 991, 997 (Alaska 1982) (salvors' misconduct results in reduction in salvage award; awarding attorney's fees to prevailing party under Alaska Civil Rule 82 and again invoking the Saving to Suitors Clause).

Even when faced with a protest to its admiralty jurisdiction, the Supreme Court of Alaska has squarely repudiated Article III's grant of exclusive jurisdiction to the federal courts. *State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984) ("statutes conferring exclusive jurisdiction on the federal district courts are to be strictly construed, and state court jurisdiction is not to be defeated by implication [!]"). Occasionally, the Alaska courts explain their jurisdiction in admiralty cases as being concurrent with that of the federal courts. *Estate of Rhyner v. Farm Credit Bank of Spokane*, 780 P.2d 1001 (Alaska 1989) (Rabinowitz, J.).

(B) *Contrarian Economic Incentives Vanquish Article III's Grant of Exclusive Jurisdiction to the Federal Courts of Admiralty*: Why? A reader in Washington, D.C. might wonder. Why would Alaska's courts want to hear admiralty cases? And why would the plaintiffs file in state court rather than in admiralty (federal) court? The answer to both questions is *money*. The salary of Alaska's district court magistrates depends in part upon their case load (the number of cases they hear or decide), as does the judiciary's annual appropriation of operating funds from the Alaska legislature. Plaintiffs' attorneys also have an irresistible economic incentive to pursue their clients' admiralty claims in state court. Alaska's courts grant generous awards of prejudgment interest and attorney's fees. The rate of prejudgment interest in state court proceedings is 10.5%, AS 09.30.070(a); AS 45.45.010(a), but in federal court it is

much lower, recently only one-half or one-third as much, 28 U.S.C. § 1961(a).

Unlike the other 49 states, Alaska has completely rejected the "American Rule" that requires each party to bear its own attorney's fees. Instead, Alaska has adopted the "English Rule" that can provide huge awards of attorney's fees to the prevailing party. *Alyeska Pipeline Service Co. v. Anderson*, 629 P.2d 512 (Alaska 1981) (award of $100,000 for attorney's fees affirmed); *Dahle v. Atlantic Richfield Co.*, 725 P.2d 1069 (Alaska 1986) (attorney fee award of $55,000 affirmed); *Williams v. Eckert*, 643 P.2d 991 (Alaska 1982) (award of attorneys fees to owner of fishing vessel who prevailed in maritime salvage dispute was proper and affirmed on appeal). When admiralty cases have been brought in Alaska's state courts, our trial judges routinely grant attorneys fees to the prevailing party. *Great West Seafoods v. Seward Shipyard, Inc.*, Case No. 3AN-91-4255 CI, (reported in Alaska Journal of Commerce, 12 April 1993, at page 9B) (after determining that this was an admiralty action, trial court awarded attorneys fees despite losing party's argument that in an admiralty action each side is required to bear its own attorney's fees; rejecting federal law).

(C) *State Courts Adrift in a Federal Sea*: The good news for admiralty plaintiffs—but of no avail to defendants, such as the Petitioners here—is that the federal court in Alaska does correctly apply The Admiralty Clause and The Saving to Suitors Clause. *Compare In re: The Glacier Bay*, 746 F.Supp. 1379 (D. Alaska 1990) (Saving to Suitors Clause does not give plaintiff a choice between common law standards or maritime law) *with Maxwell v. Olsen*, 468 P.2d 48, 50-52 (Alaska 1970) (Saving to Suitors Clause gives plaintiff a choice of filing admiralty case in state court or in federal court); compare *U.S. Dominator, Inc. v. Factory Ship*

Robert E. Resoff, 768 F.2d 1099 (9th Cir. 1985) (affirming salvage award and finding no abuse of discretion in trial court's award of prejudgment interest at the federal rate) *with Bjornson v. U.S. Dominator, Inc.*, ____P.2d _____ (Supreme Court of Alaska, Opinion No. 4023, 12 November 1993) (interpreting 46 U.S.C. §10601 and relying upon an armada of federal admiralty cases to support its decision). The almost-total absence of case authority from other state courts is a powerful clue that the state courts of Alaska have not charted a proper course.

Finally, it would be unfair to focus all of the blame upon the courts of Alaska. Indeed, there have been some decisions in the courts of New York and Connecticut that also misapply the Saving to Suitors Clause, thereby appearing to create an admiralty jurisdiction in state courts. *See, Merritt & Chapman Derrick v. Tice*, 103 N.Y.S. 333 (App.Div. 1907); (state court has authority to hear action for enforcement of salvage lien); *Reynolds v. Browning, Wells & Co.*, 231 N.Y.S. 362 (App. Div. 1928) (similar); *Thames Shipyard & Repair Co. v. Willametz*, 428 A.2d 1143 (Conn.Super. 1978) (suit by salvage company to recover from owner of sunken boat on an oral contract to raise the boat).

These state court cases are aberrations in the law, derelicts adrift in a federal sea. Counter examples are hard to find because it is so rare that a plaintiff would attempt to file a maritime salvage case in state court. For an example of what invariably happens, *see O'Neill v. Schoenbrod*, 355 So.2d 440 (Fla.App. 1978), *appeal dismissed*, 359 So.2d 1218 (Fla. 1978) (the plaintiffs' *in personam* complaint for salvage dismissed by trial court for lack of jurisdiction over the subject matter on the ground that such cases are "within the exclusive jurisdiction of the federal district courts sitting in admiralty"; affirmed on appeal and rejecting argu-

ment that state court has concurrent jurisdiction with federal court under the Saving to Suitors Clause).

III. THE TRUE MEANING OF THE SAVING TO SUITORS CLAUSE NEEDS TO BE SETTLED

The second reason for granting certiorari is the long-standing need to resolve the true meaning of the Saving Clause. No matter what your views on the admiralty jurisdiction and the Saving to Suitors Clause, there is something out there in the legal literature to support your position. Everyone has some authority, some support in the cases and treatises. But the contrast and the confusion will boggle a proctor's mind.

Starting with the most basic authorities, the legal encyclopedias, we can see what appears to be rock-solid support for the exclusive jurisdiction of the federal court sitting in admiralty:

> § 40 *Jurisdiction*. Salvage is a matter peculiarly within the jurisdiction of the admiralty courts, not only because of the place where the service is performed, but also because of the peculiar system of awarding the compensation. This jurisdiction extends to libels in rem against proceeds of salvaged property, as well as to libels in personam where the owner of the vessel or cargo has made himself personally liable to pay for salvage services. Because of this primary jurisdiction, contracts relating to salvage service are also within the jurisdiction of admiralty. The jurisdiction of admiralty extends to all waters that are in fact navigable for the purpose of trade and commerce. 68 AmJur 2d, *Salvage* §40, at 343.

The other general encyclopedia is in accord:

> §151 Jurisdiction. Suits for salvage belong by long custom to courts of admiralty.

> While a suit for salvage has been tried in a court of common law, it is well recognized that common-law courts do not have jurisdiction of salvage cases, but that they belong by long custom to courts of admiralty, which, from their extraordinary processes, are the only proper tribunals, and the court's jurisdiction of the action, if one for salvage, is not ousted by the fact that the services were rendered under contract, if notwithstanding this fact the services rendered were salvage services. 78 C.J.S., *Salvage*, §151, at 568.

Legal scholars and experts in the field appear to join in the view that admiralty's jurisdiction—at least in maritime salvage cases—is truly exclusive:

> In admiralty cases subject matter jurisdiction is commonly referred to merely as "admiralty jurisdiction." Specifically, this is the jurisdiction over all admiralty and maritime cases conferred by Article III of the Constitution and 28 U.S. C. §1333. In fact this is the most specific, if not the only, grant of federal judicial power over a named subject matter. Admiralty jurisdiction is subject matter jurisdiction.
>
> Now that terminology has been explained, the substance of the jurisdiction will next be explored. A federal district court has admiralty jurisdiction in cases involving (a) maritime contracts, (b) maritime torts, (c) maritime claims of traditional admiralty cognizance, such as salvage, general average, and maintenance and cure, and (d) statutory rights in rem, as the foreclosure of preferred ship mortgages. In fact the traditional statement is that the federal court has *exclusive* jurisdiction of an action seeking a salvage award. D. Owen, "Some Legal Troubles With Treasure: Jurisdiction and Salvage," 15 J.Mar.L. & Com. 139, at 148 (1985) (footnotes omitted; emphasis in the original).

But a wider search leads to heavy weather. Other authorities contend that the Saving to Suitors Clause really

does allow a state court to hear a maritime case. See, 2 AmJur 2d *Admiralty,* §14 (1962) ("The jurisdiction of the federal courts in admiralty and maritime matters is exclusive. There are exceptions, however, as in cases invoking the 'Saving to Suitors Clause'"). The same inconsistency can be found upon a close reading of many of the encyclopedias and treatises. For instance, *compare* 3A BENEDICT ON ADMIRALTY (7th ed. 1983) §14 (Saving to Suitors Clause does not give jurisdiction to state courts) *with id*, 1 BENEDICT ON ADMIRALTY §123 (7th ed. 1983) (some salvage cases can be heard in common law courts).

If we focus on the purpose and meaning of the Saving to Suitors Clause, we find an equally confusing debate in the legal literature. *Compare* Robertson, Admiralty and Federalism, 126 (1970) (purpose of the Clause was "preservation of the pre-Constitutional concurrent jurisdiction of the common law courts. [which courts were state courts] in maritime cases prior to 1789") with:

> The American colonial vice-admiralty courts followed the principles laid down by the English Court of Admiralty in deciding salvage cases brought before it. Cases of salvage were not tried in American common-law courts before the establishment of the Republic of the United States of America. Therefore, the saving to suitors clause of the Act of September 24, 1789 which provided that the district courts of the United States 'shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it, etc.' does not apply to salvage suits. It does not give to the common-law courts jurisdiction over a class of cases which it never possessed. Norris, *The Law of Salvage,* §14 (1980) [footnote omitted].

There are even modern cases in the federal courts that contain dicta to support the view that there is a concurrent jurisdiction in state courts. (state courts have concurrent jurisdiction to try *in personam* admiralty actions, citing Saving to Suitors Clause); *Fogelman v. Tidewater Barges, Inc.*, 747 F. Supp. 348, 354 (E.D. La. 1990) (plaintiff can file a maritime action in state court under the Saving to Suitors Clause, which preserves the plaintiff's right to common law remedies).

But how can the Saving to Suitors Clause, a mere statute, trump the Constitution? If the former is applied to yield a concurrent jurisdiction while the latter creates an exclusive one, then how can the statute and the Supreme Law be reconciled? This very question was asked almost a century ago, but the answer was lost in the legal literature:

> That the framers of the Constitution intended the admiralty jurisdiction to be exclusive is clear, despite the silence of the instrument. Decisions to that effect seem to be perfectly correct. But equally did they intend, that maritime controversies also should belong exclusively to the Federal courts. Every utterance of that day supports this view, nothing during the next generation in any of the Federal or State decisions will be found against it. Being near the sea, with little internal commerce, nearly all the maritime controversies of our ancestors occurred with the citizens of other States or the subjects of other countries. In 1816 we find Story [in *Martin v. Hunter's Lessee*] classing the judicial clause in admiralty and maritime causes with the exclusive one relating to ambassadors and consuls, which it immediately follows, and in 1866 the learned Field [in *The Moses Taylor*], not disapproving his language, comments on its many excellent reasons. It is since that time that the decisions have sustained the State jurisdiction on the common law side by citing the saving clause of the Judiciary Act. But it is

important to note here that the unconstitutionality of that clause, the suggestion of this article, has been neither raised nor decided.

The saving clause, as we have already explained, appears to us unconstitutional if it intended to leave the common law remedy to State tribunals. That this is what it intended has always been taken for granted, and yet nobody has questioned its constitutionality. But why take for granted what may make it unconstitutional? Why not suppose that it meant to save the common law remedy to *Federal* courts only, Circuit or District? There, in the common tribunals of the nation, that uniformity of decision would be maintained which was the admitted object of our ancestors. Let the statute be read however carefully and nothing will be found contrary to this construction. It was a statute distributing causes among Federal courts, and the portion involved here was a regulation of procedure in the District court. From such an enactment State court jurisdiction will not naturally be derived. Nor is there anything strained in this. The Judiciary Act in effect declared—our District Courts shall be exclusive if you wish to proceed in admiralty; you may proceed at common law in your maritime controversy, but since it is maritime, that common law action must, under the Constitution, be tried in our Federal courts, Circuit or District, as the statutes may otherwise provide. Bausman, "*Admiralty and Maritime Jurisdiction*, 36 Amer.L.Rev., 192 at 197-188 (1902) (emphasis in the original).

The authorities that can be marshaled on this debate are like statistics: they can be used to be prove either side of the argument. And this is why certiorari should be granted. Because the exclusivity, *vel non,* of federal jurisdiction is "an important question of federal law which has not been, but should be, settled by this Court." Supreme Court Rule 10.1(c)).

IV. CODA: SUMMARY DISPOSITION BY REVERSAL

Because it is such a well-settled principle of American constitutional law that federal courts have exclusive jurisdiction to hear admiralty and maritime cases, the instant case clearly has been wrongly decided by the state court. The decision of the Alaska court is just plain wrong and it should be reversed. Pursuant to Supreme Court Rule 16.1, petitioners move for summary reversal, with instructions to the lower court to dismiss this case.

CONCLUSION: THE SAVING TO SUITORS CLAUSE NEEDS TO BE EXPLAINED AND THEREBY SAVED FROM THE ABUSES OF STATE COURTS

Admiralty law is important in our Nation's relations with the world community. This is one of the reasons why the Framers took this topic away from the state courts and placed it within the exclusive domain of the federal courts, so that we would have uniformity of law throughout the nation. As an example of the international flavor of maritime law, consider salvage contracts. Almost all modern salvage is done pursuant to a standard contract, the Lloyd's Open Form Contract, which has recently been revised.[9] Public policy favors the strict maintenance of the exclusive jurisdiction of the federal courts in admiralty. The institutional role of the Supreme Court as the final arbiter of the Constitution[10] should inspire this court to grant certiorari

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[9] The revisions to this standard contract have been discussed in a series of articles that have appeared in recent years in the Journal of Maritime Law and Commerce.

[10] *Cowin v. Bressler*, 741 F.2d 410, 425 (D.C. Cir. 1982) ("the institutional role of the Supreme Court weighs in favor of considering its rulings to be general rather than limited to the

(continued...)

and pronounce the law of the Saving to Suitors Clause. After two hundred years, its meaning is still in doubt in many state courts, and these doubts should be resolved. For these reasons, certiorari should be granted. Let the writ issue.

Respectfully submitted this 10th day of January 1993 at Petersburg, Alaska.

Respectfully submitted,

Fred W. Triem
David A. Berg
Box 129
Petersburg, Alaska
99833-0129
(907) 772-3917
In Propria Persona

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[10] (...continued)
particular facts. The Supreme Court, unlike the lower federal courts, is given a largely discretionary jurisdiction, *which is used when areas of the law require clarification."*) (Bork, J.).

APPENDIX

[DATED MAY 4, 1992]

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT PETERSBURG

TAMICO, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
FRED TRIEM, DAVID BERG, and PETERSBURG AIRCRAFT SALVORS, INC.,	)	
	)	
Defendants.	)	No. 1PE-89-113 CI

TRANSCRIPT OF DECISION ON RECORD

The Honorable Thomas E. Schulz
Superior Court Judge

The Superior Court for the State of Alaska, First District at Ketchikan is now in session, the Honorable Thomas E. Schulz presiding.

Please be seated. The court is on record to put a statement of decision on the record in *Tamico, Inc. v. Triem, Berg and Petersburg Aircraft Salvors.* A judgment has been entered in this case and then a motion for reconsideration was brought in and the defendants argue, or make the comment early in their brief, that the court didn't decide that motion for reconsideration and that's not really correct. What the court did was rule that the motion for, that the matter was not properly recorded for a motion for reconsideration. Under Rule 77, because

for the first time in this case, the defendants are raising the issue of subject matter jurisdiction of the underlying claim and I ruled earlier, and remain convinced, that raising an argument such as that under Rule 77, a motion for reconsideration is simply not a proper application of that Rule. The court did say that I would treat it as properly before the court under Rule 60 and defendants have also brought the court's attention to Rule 12. In any event, the plaintiff has filed an answer, defendants have replied, we've had oral argument. The court has had an opportunity to review the briefs of the parties and authorities and primarily, on the basis of a relatively recent federal decision, I am going to deny the motion. That decision is *Metropolitan Dade County v. One Bronze Cannon* and it's found in 537 Fed. Supp. 923 and it's a 1982 case in the United States District Court for the Southern District of Florida.

To begin with, I don't have any quarrel with the basic proposition and, of course, neither does the *Metropolitan Dade County* court, with the general proposition that admiralty cases are within the exclusive jurisdiction of the Federal District Court. That's a matter of Constitutional law and I think it's also a matter of proper interpretation of the Federal Judiciary Act. The problem is that this is not an admiralty case. What happened in this case was that a DC-3, on its way from Fairbanks to California, stopped in Petersburg to refuel and then apparently, because of some problems not relevant to the decision presently before the court, crashed. It had experienced some problems shortly after take-off from Petersburg and was ditched in Wrangell Narrows, which is a body of navigable water immediately adjacent to the town of Petersburg. The plane crashed abut eight or ten miles from the airport. It came to rest, ultimately, in somewhere between

fifteen and twenty fathoms of water. The defendants, the individual defendants, were successful in locating the airplane, formed a corporation to salvage it and then, by their own pleadings, by their statements in their brief, they had entered into an agreement with the plaintiff to raise the airplane. The airplane was raised, the bill was presented, and the amount of the bill was in dispute. This litigation followed, and ultimately judgment was entered for the plaintiff. It was at that point that the defendants raised the jurisdictional issue. In order to, well let me put it this way, the basis for their argument appears to the court to be, that Tamico itself has characterized this as a salvage operation, and it was a salvage operation. An airplane crashed, sunk and it was raised, and under common understandings of salvage that's what salvage is all about, the airplane was, at least to the extent that it was raised out of the water, it was salvaged. It is not necessary to the court's decision as to whether its been totally repaired and back to service or what happened to it, but it was salvaged, but this is not a salvage claim as the term is used in maritime law. It's not the kind of salvage claim that the Constitution and the Judiciary Act intended to give exclusive jurisdiction to federal courts. In order to have a salvage claim, there needs to be a maritime peril. Now that can be a fire at sea, or even in port, or aboard a vessel; it can be in peril from a storm or from hitting reefs or numerous myriad of other things, and be involved in a maritime peril. But once an airplane has crashed and sunk, it is no longer involved in any kind of a maritime peril, so that element I think is missing. It doesn't make any difference that it was a land plane. I agree with the commentators that have expressed a view based on the sea plane case, that whether you're involved in maritime salvage or some other kind of law suit should not depend on the kind of airplane it was. The

basis for this part of the ruling is simply that there was no maritime peril involved. It was not a maritime peril that got the airplane in trouble, at least there's no allegation of that, in fact, the defendants seem to be contending to the contrary, a malfunction, some part of the aircraft itself, and it happened to crash in the water, or come down in the water. Then, in order to, the second element of the maritime salvage claim is that the service is rendered voluntarily. It cannot be a service that is required by existing duty or by special contracts. Here we clearly had an agreement, Tamico, pardon me, Petersburg Aircraft Salvage, the corporation formed by the two individual defendants, clearly entered into an agreement with Tamico to salvage the airplane and the dispute is over how much is owed, but this is not a voluntary undertaking by Tamico. And then the salvage efforts must be successful. Well, the airplane was raised. That was what Tamico was hired to do. And those elements are set out in the plaintiff's reply brief at pp. 2 and 3, and they appear to me to be an accurate statement of what the elements of maritime salvage involve and so while the defendants' brief goes into a long detailed, and frankly interesting, discussion of the sources of the admiralty jurisdiction and the exclusivity of it, it's simply not, it's not relevant to the case before the court, and that's made, I think, crystal clear in the *Metropolitan Dade County v. One Bronze Cannon* case. That case involved a, initially, an agreement between some folks and the Haitian government to conduct some salvage exploration operations off the Haitian coast. Ultimately, in 1971, a salvage expedition was successful in raising a couple of cannons, and then the cannons were placed on display in a historical museum in Florida for apparently a number of years before a dispute as to ownership arose, and then there was a lawsuit in state court, in which one of the disputants was awarded

title (garbled). Ultimately, Dade County got some interest in it from a co-salvor, and they filed an admiralty claim, a maritime salvage claim in Federal District Court. And contrary to the defendant's argument, the Federal District Court did not decide that the State Court common law action couldn't handle the claim. What he ruled was that the State Court did not have the maritime salvage issue before it, it didn't decide that and the State Court decision didn't bar him, therefore, from proceeding on the admiralty claim, from deciding those issue. He also, of course, ruled, and I think this is correct, that the State Court wouldn't have jurisdiction of the maritime salvage claim in any event. But that case, as I indicated earlier, is found at 537 Fed. Supp. at 923, and if you look at page 927, and I'm going to quote here, from page 927, the judge says:

> A plaintiff who has an admiralty claim for damages for breach of contract has several options: (1) "The claimant may invoke the federal admiralty jurisdiction under the grant of original subject matter jurisdiction 28 U.S.C. section 1333," or (2) "By virtue of the saving suitors clause he may sue at law in State Court or in Federal District Court. [If however, the plaintiff elects the latter], the requirements of diversity of citizenship and the jurisdictional amount must be satisfied." 14 Wright, Miller and Cooper, section 3672.

See Romero v. Bethlehem Steel Corp., 515 F.2d 1249, that's a 5th Cir. case, for that proposition. "The basic reasoning is," he's going on here, "the basic reasoning is that suits on maritime contracts that are *in personam* and may be brought into Federal Court under the head of diversity jurisdiction. For instance, in *Romero* the court acknowledged that 'an action for personal injury cognizable in admiralty may be brought, assuming the existence of some

independent jurisdictional base like diversity of citizenship, as a civil suit pursuant to the 'savings to suitors clause' of 28 U.S.C. Section 1333," and the plaintiff is entitled to a jury trial." (Citation omitted). No where in that *Metropolitan Dade County* case does the Federal District Court hold that, as the defendants seem to be arguing, that if you elect to pursue a common law remedy as the plaintiff did here, you have to do it in Federal District Court. What the *Metropolitan Dade County* case stands for has been good law for hundreds of years. It is that admiralty jurisdiction rests exclusively within the Federal District Court, but under our Judiciary Act plaintiffs who may have an admiralty claim can also bring a common law claim if they have, if that claim is supported by an appropriate jurisdictional basis.

In conclusion I find the court had jurisdiction for the judgment in this case and deny the motion for relief from judgment. The request for a judgment debtor hearing, set that on in the next couple of weeks and notify counsel. We can go off record.

Dated at Ketchikan, Alaska, this 4th day of May, 1992.

/s/ Thomas E. Schulz
Thomas E. Schulz
Superior Court Judge

[DATED MAY 13, 1993]

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT PETERSBURG

TAMICO, INC.,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
FRED TRIEM, DAVID BERG, and PETERSBURG AIRCRAFT SALVORS, INC.,	)	
	)	
Defendants-Appellants.	)	No. 1PE-89-113 CI

MEMORANDUM OF DECISION ON APPEAL

I. Introduction

The defendants appeal the district court's decision which denied their motion to dismiss and which found that the court had jurisdiction. Defendants also appeal several other decisions of the district court rendered early in the proceedings.

II. Facts

This case starts with a plane crash. A DC-3 airplane made a forced landing and sunk in the Wrangell Narrows near Petersburg. When the plane crashed, an Anchorage insurance company sold the plane to Fred Triem and David Berg, who incorporated Petersburg Aircraft Salvors, Inc. (PAS) for the purpose of recovering the plane. PAS hired

the plaintiff-appellee, Tamico, Inc., to raise the plane.[1] The recovery of the airplane was completed on July 6, 1989, 10 days after the plane had sunk. Tamico submitted a bill of $14,160 to PAS dated July 8, 1989[2] PAS did not pay the bill.

Tamico filed a complaint for debt on October 3, 1989. Substantial litigation followed. Finally, as a sanction for persistent discovery violations, default judgment was entered against PAS, Fred Triem, and David Berg, jointly and severally the amount of $22,974.61. (Judgment, October 2, 1991) The default was entered because of the "defendants' failure to respond to the motion requesting dismissal of the answer and entry of default."[3] (Order, September 24, 1991) PAS filed a motion to reconsider. (Defendants' Motion to Reconsider, October 21, 1991). While that motion was pending, defendants moved for relief from judgment, challenging for the first time the

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[1] The contract, however, was not contingent upon Tamico's success in the venture. It was a contract for services.

[2] While preparing for retrieval of the plane, Tamico allegedly presented PAS with a written contract specifying a base fee of $6,000 plus an hourly rate for overtime. (Petition for Review of Petersburg Aircraft Salvors, Inc., April 19, 1990, at 3-4)

[3] The defendants argue that they simply could not comply with discovery because Fred Triem was disqualified from representing the defendants. (Appellants' Opening Memorandum, October 5, 1992, at 3)

Defendants challenge many of the district court's decisions from early in the suit. For example, defendants argue that (1) they should have been allowed to represent themselves, (2) that the district court erred in not dismissing Triem and Berg in their individual capacities, (3) that the district court erred in computing attorney's fees and prejudgment interest. (Appellants' Opening Brief, October 5, 1992, at 4-5) The implication that defendants make is that but for these allegedly erroneous decisions, there may never have been a default judgment entered.

jurisdiction of the state court. (Defendants' Motion for Relief from Judgment, December 20, 1991) Both motions were denied by Order of May 4, 1992. The district court concluded that it had jurisdiction. (Transcript of Decision and Order, May 4, 1992, at 7)

III. Arguments

1. Jurisdiction

PAS frames the argument thus: "Does the Saving to Suitors Clause of the Judiciary Act of 1789 create in the state courts a concurrent jurisdiction to hear admiralty and maritime cases?" (Appellants' Opening Brief, October 5, 1992, at 1) [hereinafter "At. Br."] PAS argues that this action is a salvage action that rests squarely within federal admiralty jurisdiction. The saving to suitors clause only preserves a common law remedy, but not the right to have the case heard in a common law court, PAS argues.

Tamico responds that this is a contract action, not an salvage action. Tamico argues that PAS fails to establish either that a maritime peril existed or that the salvage service was voluntary, both of which are elements of a salvage action. Tamico argues that there is no need for federal court expertise because this action involves a contract, and thus there is no necessity to make a "salvage award" which might require greater expertise. Tamico also argues that admiralty jurisdiction may not extend to land-based aircraft. Finally, Tamico cites authority to the effect that if a contract is non-contingent on recovery of the vessel, that the contract is not a salvage contract.

2. Alaska Statute 10.06.848(a)

PAS argues that Tamico failed to comply with AS 10.06.848(a) when it filed suit. Alaska Statute 10.06.848(a)

requires that a corporation prove its good standing at the time that it files suit. PAS argues that failure to establish good standing at the time that suit is filed cannot be cured by subsequent proof of good standing. Therefore, PAS argues, the suit must be dismissed.

Tamico argues that it has proven its good standing. Tamico argues that AS 10.06.848(a) is not in the nature of a pleading requirement, but is simply meant to ensure that corporations doing business in Alaska comply with the appropriate rules and regulations. Tamico cites case law from a similar predecessor statute that hold that capacity to sue can be alleged or proven at a later date than at the time an action is commenced.

3. Attorney's Fees Based on Default or Contested Suit Standards

PAS argues that because a default judgment was entered against it, the default standards of Alaska Civil Rule 82 should apply.

Tamico argues that this matter was "hotly contested" and, although settled short of trial, should be governed by the contested trial standards.

4. Dismissal of Triem as Legal Counsel for PAS

PAS argues that AS 22.20.040, which forbids a corporation from appearing *pro se*, is unconstitutional because it violates the separation of powers doctrine. It also argues that DR 5-101, refusing employment when the interests of the lawyer may impair his independent professional judgment, and DR 5-102, withdrawal as counsel when the lawyer becomes a witness, are both unconstitutional. PAS argues that it was prejudiced because in the confusion of

looking for an attorney to represent it, default was entered.

Tamico argues that PAS has suffered no prejudice because it simply refused to obey the court order because Triem continued to file motions on behalf of the appellants. Tamico argues that Triem could have at least appeared himself. Tamico also argues that important interests are advanced by preventing an attorney who is also a major witness from testifying at trial.

5. Claims against Triem and Berg in their Individual Capacity

PAS argues that the action in reality involves a suit between two corporations and that the claims against Triem and Berg should have been dismissed. PAS argues that the court ruled in its favor on this issue, but then did not enter a judgment of dismissal in its favor.

Tamico argues that the district court at no point intended permanently to dismiss Triem and Berg from the suit. Tamico argues that the 1990 orders leave no doubt about the district court's decision to leave Triem and Berg in the suit.

6. Calculation of Prejudgment Interest

PAS argues that no writing or contract between the parties specifies a rate higher than the statutory rate of 10.5%. Tamico argues that AS 09.30.070(a) requires a 10.5% rate of interest unless otherwise established by a writing. They argue that its bill of July 8, 1989 states that amount of the claim, and also states that unless the bill was paid in full within 30 days that the unpaid balance would accrue interest at the rate of 1-1/2% per month.

Tamico argues that although PAS never expressly consented to this rate of interest, its failure to pay within 30 days was an implied acceptance of the terms.

IV. Standard of Review

The district court's findings of fact will not be set aside unless "clearly erroneous". Alaska R. Civ. P. 52(a). Before setting aside a finding of fact, the court must be left with "a definite and firm conviction on the whole record that the judge made a mistake." *Smith v. Smith*, 673 P.2d 282, 283 (Alaska 1983). If there are no disputed facts, then a question of law is presented. *Fireman's Fund Mortgage Corp. v. Allstate Ins. Co.*, 838 P.2d 790, 792 n.4 (Alaska 1992). On questions of law, this court is not bound by the lower court's decision but will apply its independent judgment in applying the applicable rule of law. In the event that the law is not settled, a reviewing court will exercise "independent judgment and adopt the rule which is most persuasive in light of precedent, reason, and policy." Id.; *Guin v. Ha*, 591 P.2d 1281, 1284 n.5 (Alaska 1978).

V. Issues

1. Whether the district court had jurisdiction to decide the contract dispute
2. Whether the action should be dismissed because of Tamico's failure to prove its good standing at the time that it filed suit
3. Whether attorney's fees were appropriately calculated
4. Whether dismissal of Triem as attorney for PAS was proper

5. Whether the district court erred in allowing claims against Triem and Berg in their individual capacity

6. Whether the appropriate rate of prejudgment interest was used

VI. Analysis

1. *Whether the district court had jurisdiction to decide the contract dispute*

Whether or not a state court will have jurisdiction over the present claims will involve, in one way or the other, an interpretation of 28 U.S.C.A. Sec. 1333(1) (West 1966 & Supp. 1993):

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty of maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

The district found that this was *not* a maritime salvage action because (1) no maritime peril was involved and because (2) the service to recover the vessel was not voluntarily rendered.[4] (Transcript on Decision on Record, May 4, 1992, at 4-5) This court upholds the conclusion reached by the district court—that a state court may decide the dispute—but for different reasons.

As to whether a marine peril was involved, it is generally accepted that recovery of a sunken vessel, including

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[4] Tamico reiterates these themes, although it provides no legal citation for these two specific propositions. Tamico also argues that the expertise of the maritime courts is not necessary because this case presents a simple action of contract interpretation, and no salvage award is necessary.

airplanes,[5] satisfies the peril standards. 68 Am. Jur. 2d *Salvage* § 52 (2d ed. 1993); 3A Martin J. Norris, *Benedict on Admiralty* § 31 (1993) [hereinafter "Benedict"]. "Peril" does not mean imminent threat:

> The peril necessary to constitute a salvage service need not be one of imminent and absolute danger. The property must be apprehended. It is not the degree of peril which makes for a salvage service. If distress or peril is present then with voluntary service and success a valid salvage service has been performed. The degree of peril—whether slight or serious—can affect the amount of the award, but not the establishment of a salvage service.

Benedict, *supra* § 63 (footnotes omitted). The recovery of the component parts of the plane alone were estimated at close to $200,000, and clearly the components were in peril as defined by Benedict.

As to the voluntariness requirement, the district court held that because there was a contract between PAS and Tamico, Tamico's actions were not voluntary. (Transcript at 5) This would be true if the action were a "pure salvage" action, but not necessarily if it were a "contract salvage" action. A "pure salvage" action is defined as a "voluntary service rendered to imperiled property on navigable waters where compensation is dependent upon success, *without prior agreement or arrangement having*

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[5] The district court rejected the contention that land-based aircraft were not subject to maritime salvage actions. (Transcript at 4) The court finds this reasoning sound and in accord with recent case law. *See Mark v. South Continental Ins. Agency, Inc.*, 1978 A.M.C. 519 (P.R. Cir. 1978); Martin J. Norris, *The Law of Seamen*, § 9.31 (4th ed. 1985) (while the question is still not free from doubt, admiralty courts can and should grant salvage awards for beneficial service rendered to distressed land-based planes).

been made regarding the salvor's compensation . . . ." Benedict, *supra* § 159 (emphasis added). In contrast, a "contract salvage" is "that type of salvage service entered into between the salvor and the owners of the imperiled property, or by their representatives, pursuant to an agreement, written or oral, fixing the amount of compensation to be paid whether successful or unsuccessful in the enterprise." Benedict, *supra* Sec. 159 (footnotes omitted). The district court clearly only contemplated the first type of salvage claims: pure salvage. But pure salvage is not even at issue here: it is uncontested that PAS and Tamico entered into a contract prior to the plane's removal. The fact that they entered into a contract does *not* mean that a salvage action may not be maintained under maritime jurisdiction: "A court of admiralty has jurisdiction of the subject matter in salvage suits whether the action is one of pure salvage *or one of contract salvage.*" Benedict, *supra* § 159 (emphasis added); *see Clifford v. M/V Islander*, 565 F.Supp. 922, 927 (D. Mass. 1983) (applying contract salvage principles).

Whether or not the contract between PAS and Tamico is a valid contract salvage is made the more difficult to determine because the contract did not require successful completion of the contract. There is a split of authority whether a contract salvage must be contingent upon successful salvage of the vessel. Martin J. Norris, *The Law of Seamen* § 9.43 (4th ed. 1985) (must be contingent on successful salvage); Benedict, *supra* § 159 (no contingency on success necessary); *Clifford*, 565 F.Supp. at 927 (no contingency on success necessary).

The court need not finally decide whether or not PAS' claim may be maintained as a contract salvage action. The central question is whether a claim cognizable both at common-law and also as a contract salvage action may be

heard in a state court. PAS has subtly misstated the problem before the court. PAS would have the court believe that the question is whether or not state courts have concurrent jurisdiction with federal courts to hear *admiralty and maritime cases*. The way PAS formulates the question, the answer can only be no. More accurately, however, the question is whether a state court may hear an action that may be maintained *either* as a contract action or as a contract salvage action.

The courts have interpreted the "savings to suitors" clause as preserving a common law remedy where the common law is competent to give it: "This gives the Plaintiff 'who has an *in personam* claim the choice of proceeding in an ordinary civil action," or 'bringing a libel in admiralty.' " *Metropolitan Dade County v. One (1) Bronze Cannon*, 537 F.Supp. 923, 927 (Fla. 1982) (quoting 14 Charles A. Wright et al., *Federal Practice and Procedure* § 3672 (1976)). It has been explained that admiralty jurisdiction is *exclusive* only to *in rem* proceedings: "Admiralty's jurisdiction is 'exclusive' only as to those maritime causes of action begun and carried on as proceeding *in rem*, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien." *Dade*, 537 F. Supp. at 928. The "savings to suitors" clause preserves the common law remedies, i.e., those remedies which are *in personam* in nature. *Bergeron v. Quality Shipyards, Inc.*, 765 F.Supp. 321, 323 (E.D. La. 1991); *see also Thames Shipyard & Repair Co. v. Willametz*, 428 A.2d 1143 (1978) (on facts very similar to the instant case, except that an oral contract was involved, the court applied exclusively state contract doctrines with no mention of federal law). *Bergeron* makes clear that Tamico's *in personam* action may be maintained in state court. In fact,

in cases where a party has attempted to remove a case from state to federal court on the ground that a common law claim was in reality an admiralty claim, the courts have expressly rejected the removal. *Fogleman v. Tidewater Barges, Inc.*, 747 F.Supp. 348, 355 (E.D. La. 1990). In essence, that is precisely what PAS seeks to do: it seeks a ruling that the common law claim is in reality a salvage claim that may only be brought in federal court. This court could not make such a finding without thereby also changing the very nature of the claim, and therefore declines PAS' suggestion to hold Tamico's claim to be an admiralty salvage claim. *See Bergeron*, 765 F.Supp. at 323. While Tamico could have chosen to pursue its remedies under salvage contract law, an effort that may or may not have been successful, it chose to pursue its normal contract remedies. Its decision is expressly permissible under the "savings to suitors clause".

2. *Whether the action should be dismissed because of Tamico's failure to prove its good standing at the time that it filed suit*

Tamico did not prove its good standing until six months after it filed suit. The certificate of compliance that Tamico finally filed indicated that Tamico, Inc. has been in good standing continuously since July 29, 1976.

PAS argues for strict compliance with AS 10.06.848, which reads in part:

> A domestic or foreign corporation may not commence a suit, action, or proceeding in a court in this state without alleging and proving at the time it commences the suit, action, or proceeding that it has paid its biennial corporation tax last due and has filed its biennial report for the last reporting period.

The predecessor provision was somewhat more loosely worded:

> No corporation shall be permitted to commence or maintain any suit, action, or proceeding in any court of this state, without alleging and proving that it has paid its annual license fee last due . . .

AS 10.05.720 (superseded). Under AS 10.05.720, the case law indisputably allowed a corporation to late-file its proof of good standing. *See, e.g., King v. Petroleum Services Corp.*, 536 P.2d 116, 118 (Alaska 1975). The purpose of the requirement that a certificate of good standing be filed is to ensure that corporations file the appropriate reports and taxes. *Blake v. Gilbert*, 702 P.2d 631, 636-37 (Alaska 1985). It is clear in this case that Tamico has filed all reports and paid all taxes; the question is whether it should be barred forever from seeking relief in the courts because it failed to allege that it had done so *when it filed suit.*

Rigid adherence to the requirement that a corporation file its certificate of good standing immediately at the outset of the litigation, or not at all, is not mandated by the law. Rigid adherence would defeat, to a substantial extent, the civil rules' goal for the *just* and speedy resolution of disputes. Alaska R. Civ. P. 1. Under PAS' interpretation, if a corporation late-files its certificate of good standing, by even one day, dismissal must occur. This result is not in accord with the general rule that dismissal under Alaska Civil Rule 12(b)(6) is not appropriate unless the opposing party can produce no set of facts to cure the defect. *Shooshanian v. Wagner*, 672 P.2d 455, 461 (Alaska 1983). It is also not in accord with the previously stated rule allowing a corporation to cure substantial defects in its pleading even after initial filing. *King*, 536 P.2d at 118. While, therefore, filing of a certificate of good standing may be required of a corporation which has not

done so, or affirmative defenses raised based on a corporation's apparent lack of capacity for failure to file a certificate when it files suit, dismissal of the action is neither a necessary nor even a desirable result. The court rejects PAS' contention.

3. *Whether attorney's fees were appropriately calculated*

Alaska Civil Rule 82 provides only a suggested schedule of fees. Rule 82 specifically provides the court with discretion in setting attorney's fees. A grant of attorney's fees by the district court will be reviewed on an abuse of discretion standard. *Grasle Elec. Co. v. Clark*, 525 P.2d 1081, 1086 (Alaska 1974). The fact that this action was settled by default judgment does not reflect the considerable underlying litigation, and it was fully within the district court's discretion to award full attorney's fees. The court affirms the district court's award.

4. *Whether dismissal of Triem as attorney for PAS was proper*

PAS argues that DR 5-101(B), DR 5-102, and AS 22.20.040 are all unconstitutional. PAS does not support its claim. Salutary reasons exist to support these rules. Most broadly stated, the rules all advance the goals of integrity of the legal process. The rules prevent the inherently inconsistent role of a lawyer attempting to be both advocate and witness. This rule has been approved by courts both in the corporate setting, *Gasoline Expwy, Inc. v. Sun Oil Co. of Pennsylvania*, 407 N.Y.S.2d 65-66 (1978), and also in the general setting of Alaska's disciplinary rules, *Murray v. Feight*, 741 P.2d 1148, 1160 (Alaska 1987). The court finds no good reason to find the rules unconstitutional, and upholds the decision of the district court disqualifying Triem as counsel for PAS.

5. *Whether the district court erred in allowing claims against Triem and in their individual capacities*

PAS argues that the district court ruled in its favor on the issue of summary judgment dismissing it from the litigation, but then refused to enter a judgment of dismissal in its favor. The record does not support this claim. On January 17, 1990, the district court did rule in its favor on a summary judgment motion. However by order of clarification dated June 4, 1990, the court held: "The court's order of January 17, 1990, granted summary judgment only as to the claims stated in the original complaint." There is no indication that the court intended either Triem or Berg to be permanently dismissed from the suit.

PAS argues that Triem and Berg were never proper parties to the litigation. They fail to support this assertion. Given the fact that Triem and Berg are the principals and only stockholders in PAS, and given the limited purposes for which PAS was formed, it may be that Triem and Berg may be held individually liable based on an alter ego theory of corporate law. In any event, it is not clear to the court why Triem and Berg are not proper parties to the action. The court finds no error in the district court's decision not to dismiss Triem or Berg.

6. *Whether the appropriate rate of prejudgment interest was used*

Prejudgment interest is 10.5% unless a contract in writing[6] exists providing for payment at a specified interest rate. AS 09.30.070. Tamico argues that the bill it presented

[6] Tamico argues that a writing is necessary, and points to its billing statement. It is correct that there must be a writing. However the writing must be of a specific type: a contract.

to PAS constituted a "dual offer": PAS could either pay the balance in full within 30 days and accrue no interest charges or have the unpaid balance accrue interest at the rate of 1-1/2% per month. Tamico argues, in effect, that PAS accepted the accrued rate (18%) because it withheld payment beyond 30 days.

Tamico must prove that PAS' inaction or silence is an acceptance. However, it fails to make *any* supportive argument or cite to any supporting legal authority. The general rule is that silence and inaction will not be construed as an assent to an offer. Samuel Williston, *A Treatise on the Law of Contracts* § 6.49 (4th ed. 1991) [hereinafter "Williston"]. The surrounding circumstances may be considered. Williston, *supra* § 6.49. In this instance, the surrounding circumstances indicate that PAS strenuously objected to paying the bill in the first instance; given its strong objections to the bill, the court cannot conclude that PAS' silence was an acceptance as Tamico alleges. Interest should therefore be calculated at the rate of 10.5%.

VII. Conclusion

For the foregoing reasons, the court affirms the district court's rulings in all respects except that a prejudgment interest must be calculated at 10.5%. The case is affirmed in all respects except interest calculation, and remanded to the district court for entry of judgment in conformity with this opinion.

IT IS SO ORDERED.[7]

Done this 13th day of July, 1993.

/s/ Walter L. Carpeneti
WALTER L. CARPENETI
Superior Court Judge

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[7] Appellee, the prevailing party in this appeal, is awarded $500 in attorney's fees pursuant to R.App.Pro. 508(e).

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT PETERSBURG

TAMICO, INC.,	)	
Plaintiff-Appellee,	)	
vs.	)	
	)	
FRED TRIEM, DAVID BERG,	)	
AND PETERSBURG AIRCRAFT	)	
SALVORS, INC.,	)	
Defendants-Appellants.	)	No. 1PE-89-113 CI

JUDGMENT

This matter came before the court on plaintiff's motion for sanctions and entry of default on the 30th day of July 1991, and the court being duly advised in the premises,

NOW, THEREFORE, judgment is hereby entered against defendants, jointly and severally, in the amount of Fourteen Thousand One Hundred Sixty Dollars ($14,160.00) plus accrued interest in the amount of Five Thousand Forty-one and 74/100th Dollars ($5,041.74), together with costs in the amount of Sixty-six and 56/100th Dollars ($66.56), Rule 82 attorneys' fees in the amount of Three Thousand Four Hundred Fifty-six and 31/100th Dollars ($3,456.31) and sanctions imposed on June 14, 1991, in the amount of Two Hundred Fifty Dollars ($250.00), for a total judgment in the amount of Twenty-two Thousand Nine Hundred Seventy-four and 61/100th Dollars ($22,974.61).

Dated at Ketchikan, Alaska, this 2nd day of October, 1991.

/s/ Thomas E. Schulz
Superior Court Judge

CONSTITUTIONAL PROVISION AND STATUTES

Admiralty Clause, U.S. Constitution:

> Article III, Section 2, Clause 1: The judicial Power shall extend to . . . all Cases of admiralty and maritime jurisdiction . . .

Saving to Suitors Clause (Original Version):

> Sec. 9. *And be it further enacted*, That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United states. And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the

United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

The Judiciary Act of 1789, 1 Stat. 73.

28 U.S.C. §1333(1) (Saving to Suitors Clause, current version):

28 U.S.C. § 1333 Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

(As amended May 24, 1949, c. 139, § 79, 63 Stat. 101.)

Petitioners sought discretionary review in the Supreme Court of Alaska pursuant to Alaska Appellate Rule 302(b). Their petition for hearing was timely but it was denied.

The Order of the Supreme Court of Alaska that denied the Petition for Hearing was entered on 16 September 1993. It is not reported. The text consists of only two sentences:

In the Supreme Court of the State of Alaska

Petersburg Aircraft Salvors, Inc.,
Fred W. Triem, and David A. Berg,
Petitioners

v.

Tamico, Inc.,
Respondent

Case No. S-5822

It is ordered: the Petition for Hearing filed on August 13, 1993 is denied. Entered at the direction of the Supreme Court on September 16, 1993.

(*signed*)

Clerk of the Appellate Courts
Anchorage, Alaska

ERRATA SHEET

Page 10, third paragraph, erroneous citation, should read:

(1) There is a conflict between state courts, SUPREME COURT RULE 10.1(b). {Had miscited to 10.1(a).}

Page 27, first paragraph, missing case citation, should read:

There are even modern cases in the federal courts that contain dicta to support the view that there is a concurrent jurisdiction in state courts. *Bergeron v. Quality Shipyards, Inc.*, 765 F.Supp. 321, 323 (E.D. La. 1991) (state courts have concurrent jurisdiction to try *in personam* admiralty actions, citing Saving to Suitors Clause); *Fogleman v. Tidewater Barges, Inc.*, 747 F.Supp. 348, 354 (E.D. La. 1990) (plaintiff can file a maritime action in state court under the Saving to Suitors Clause, which preserves the plaintiff's right to common law remedies).

{Happily for the Petitioners herein, there never has been a decision of a federal court in which the *holding* is to that effect.}

Page 30, final line, erroneous date of submission, should read:

Respectfully submitted this 10th day of January 1994 at Petersburg, Alaska.

Page 30, footnote no. 10, missing parenthetical, should read:

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10 (...continued)

particular facts. The Supreme Court, unlike the lower federal courts, is given a largely discretionary jurisdiction, *which is used when areas of law require clarification.*") (Bork, J.) (emphasis added)

EXHIBIT A—Maritime salvage operation with *M/V Matanuska* in background (the *Matanuska* serves the Alaska Marine Highway from Brit. Columbia).

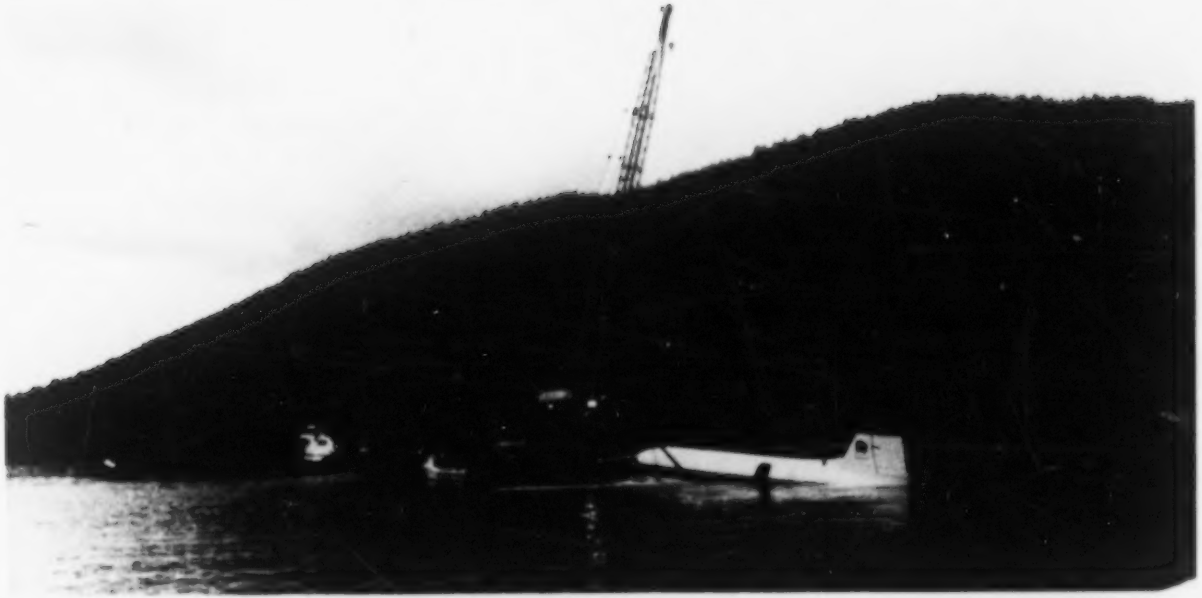

EXHIBIT B—After the sunken plane was raised, it was towed to shore.